UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ABDUL MUKHTAAR,	:	
Petitioner,	:	
	:	PRISONER
v.	:	Case No. 3:02cv880(CFD)
	:	
JOHN ARMSTRONG,	:	
Respondent.	:	

RULING AND ORDER

The petitioner, Abdul Mukhtaar, is currently confined at the MacDougall Correctional Institution in Suffield, Connecticut. He brings this action pro se for a writ of habeas corpus against the Connecticut Corrections Commissioner, pursuant to 28 U.S.C. § 2254, challenging his Connecticut conviction for murder. The respondent asks the Court to dismiss this action without prejudice because Mukhtaar has not exhausted his state court remedies with regard to certain of the grounds for relief asserted in this petition. Mukhtaar has moved to withdraw this action without prejudice to re-filing after he exhausts his state court remedies. For the reasons set forth below, Mukhtaar's motion to withdraw is granted.

I. PROCEDURAL BACKGROUND

In September 1997, a jury in the Connecticut Superior Court for the Judicial District of Fairfield at Bridgeport found Mukhtaar guilty of murder. The court sentenced him to a term of imprisonment of fifty years. Mukhtaar appealed the judgment of conviction to the Connecticut Appellate Court. Pursuant to Connecticut General Statutes § 51-199(c), the appeal was transferred to the Connecticut Supreme Court.

On direct appeal, the petitioner challenged his conviction on four grounds: the trial court

improperly (1) rejected his claim that the state, during jury selection, had exercised its peremptory challenges in a racially discriminatory manner; (2) failed to make an adequate inquiry into allegations of juror bias; (3) permitted the state to introduce a witness's prior inconsistent written statement as substantive evidence; and (4) instructed the jury on the presumption of innocence and reasonable doubt. State v. Mukhtaar, 253 Conn. 280, 282, 750 A.2d 1059, 1064 (2000). The Connecticut Supreme Court affirmed the conviction. See id. at 311, 750 A.2d at 1079.

On January 31, 2001, the petitioner filed a petition for writ of habeas corpus in the Connecticut Superior Court for the Judicial District of New Haven. The petitioner withdrew the action on February 28, 2001. See Mukhtaar v. Commissioner of Correction, CV-0447747-S (Withdrawal of Action) (Conn. Super. Ct. Feb. 28, 2001).

On April 2, 2001, the petitioner filed a second state habeas petition. He asserted four claims, generally described as follows: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct and judicial misconduct. See Mukhtaar v. Warden, CV-01-0449755-S (Conn. Super. Ct. Apr. 2, 2001). That petition remains pending in state court.

On August 27, 2002, Mukhtaar filed a third state habeas petition alleging that his appointed counsel in his second habeas petition was ineffective. See Mukhtaar v. Warden, CV-02-0819539-S (Conn. Super. Ct. Aug. 27, 2002). That petition is also still pending in state court.

Mukhtaar commenced this action in May 2002. (See doc. # 1.) He filed an amended petition on September 6, 2002. (See doc. # 3.) Mukhtaar raises four grounds for relief in his amended petition: (1) trial counsel refused to permit Mukhtaar to testify at trial; (2) the prosecutor committed several acts of misconduct; (3) the trial judge failed to find evidence of juror bias; and (4) the trial judge

should not have permitted certain witnesses to testify.

II. STANDARD OF REVIEW

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of all available state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir.), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, ... state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." See O'Sullivan, 526 U.S. at 845.

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must have "utilized all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). "To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims to the highest court of the pertinent state." Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994), cert. denied, 514 U.S. 1054 (1995) (internal citations and

quotation marks omitted). See also Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990) ("[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition."); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) (same).

III. DISCUSSION

The respondent has moved to dismiss this action without prejudice on the basis that Mukhtaar has not exhausted his state court remedies with regard to certain of the claims asserted in his amended federal petition. In response, the petitioner has moved to withdraw this action to enable him to exhaust his state court remedies as to all claims in the amended petition.

Mukhtaar has not exhausted his state court remedies with regard to the first two claims in his amended federal petition–his claims that his trial counsel wrongfully prevented him from testifying and his claim that the prosecutor (1) wrongfully represented his criminal history to the jury and (2) had improper contact with the jury panel. Mukhtaar has raised these claims, however, in his second state petition for writ of habeas corpus which is currently pending in state court.

The petitioner *has* exhausted his third claim for relief - regarding juror bias - and may have exhausted his fourth claim of permitting certain witnesses to testify.[1] He raised such grounds on his direct appeal. However, he also raised these claims in his second state petition for habeas corpus which is currently pending in state court.

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[1]It is clear that the third claim of the federal habeas petition - that a juror told a sheriff of intimidation of the jury by friends of the defendant - was exhausted in the direct appeal to the Connecticut Supreme Court. There is some question as to the fourth claim of the federal habeas petition. In that petition, Mukhtaar challenges the trial court's permitting witnesses to testify who have given a number of inconsistent statements, but also mentions the improper admission of prior inconsistent statements. The latter was exhausted by way of the direct state appeal.

The United States Court of Appeals for the Second Circuit has cautioned the district courts not to dismiss a mixed petition containing exhausted and unexhausted claims where an outright dismissal would preclude the petitioner from having all of his claims addressed by the federal court. The Second Circuit advised the district court to stay the petition to permit the petitioner to complete the exhaustion process and return to federal court. See Zarvela v. Artuz, 254 F.3d 374, 380-83 (2d Cir. 2001) (recommending that the district court stay exhausted claims and dismiss unexhausted claims with direction to timely complete the exhaustion process and return to federal court "where an outright dismissal 'could jeopardize the timeliness of a collateral attack.'").

The applicable limitations period is described in the statute as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Here, the petitioner's conviction became final on August 15, 2000, at the expiration of the time within which he could have filed a petition for certiorari to the United States Supreme Court. See Williams v. Artuz, 237 F.3d 147, 151 (2d Cir. 2001) (holding in case where petitioner had appealed to

state highest court, direct appeal also included filing petition for certiorari to Supreme Court or the expiration of time [90 days] within which to file petition), cert. denied, 534 U.S. 924 (2001). The limitations period ran for 168 days until it was tolled on January 31, 2001, by the filing of Mukhtaar's first state habeas petition. The limitations period began to run again on March 1, 2001, the day after Mukhtaar withdrew his first state habeas petition. The limitations period ran for 32 days until it was tolled again on April 2, 2001, by the filing of Mukhtaar's second state habeas petition. That petition remains pending in state court. Thus, the limitations period has remained tolled from April 2, 2001 through the present date.

Though the petitioner raises both exhausted and unexhausted claims in the instant petition, the Court is not faced with a typical "mixed petition" scenario. Construing his pending state habeas petition liberally, the petitioner is seeking review of both his exhausted and unexhausted claims. As noted above, although the petitioner already exhausted his claims regarding juror bias and prior inconsistent statements, he raises them again in his currently pending state habeas petition. Section 2244(d) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."[2] Accordingly, the time during which Mukhtaar's claims

[2]A state habeas application is "properly filed" when its delivery and acceptance comply with local rules regarding filings, such as filing in the proper court with the requisite filing fee. See Artuz v. Bennett, 531 U.S. 4, 8-9 (2000) (holding that a state court motion to vacate judgment of conviction was "properly filed" even though it contained claims that were procedurally barred under state law). In Artuz, the U.S. Supreme Court stated that "[t]he question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar." Id. at 9. As Mukhtaar's habeas petition is currently pending in state court, this Court assumes that Mukhtaar's application was "properly filed" under state rules governing filings.

regarding juror bias and prior inconsistent statements remain pending in his state habeas action is not counted towards the one-year limitations period. Said differently, the limitations period for *each of the petitioner's claims* has been tolled since April 2, 2001.

Accordingly, unlike the circumstances in Zarvela, the dismissal or withdrawal of this petition would not jeopardize Mukhtaar's ability to raise all of his claims in federal court. The limitations period for *the entire petition* has been tolled since April 2, 2001 and will remain tolled until the state court rules on his state habeas petition. There are approximately 165 days remaining in the one-year limitations period for the petitioner to re-file his federal habeas petition after the state court rules on his state habeas petition. Accordingly, the Court declines to dismiss the unexhausted claims and stay the petition, but rather, allows the petitioner to withdraw his petition and re-file it at a later date.[3]

IV. CONCLUSION

For the foregoing reasons, the petitioner's motion to withdraw this action [Doc. #6] is **GRANTED** and the respondent's motion to dismiss without prejudice [Doc. #4-1] and stay [Doc. #4-2] are **DENIED AS MOOT**. The Clerk is directed to close this case.

The Supreme Court has recently held that,

> [w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

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[3]The re-filed petition will not count as a "second or successive" habeas petition under 28 U.S.C. § 2244(b)(2). See Zarvela, 254 F.3d at 383 & n.4 (refiled petition was not "second or successive" petition because court allowed petitioner to withdraw first petition in order to exhaust unexhausted claims).

Slack v. McDaniel, 529 U.S. 473, 484 (2000). In addition, the Court stated that, "[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id. This Court concludes that a plain procedural bar is present here; no reasonable jurist could conclude that the petitioner has exhausted his state court remedies with regard to all grounds for relief or that he should be permitted to proceed further. Accordingly, a certificate of appealability will not issue.

SO ORDERED this ___ day of September 2003, at Hartford, Connecticut.

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Christopher F. Droney
United States District Judge